Other shows are obtained from units of other vertically integrated companies, such as Fox. Where there are opportunities for independent producers, the independents face a number of impediments. The networks may force independent producers to fund development and/or produce a pilot on a loss basis and then demand an equity position in a show in order for it to be put on the prime time schedule; they may require control of syndication of an independent program, and then sell that show to an affiliated cable channel at a discount, thus reducing the 'backend' participation of the independent producer; and the network may give independently produced shows a less attractive time slot and less time to prove itself when it is placed on the network schedule.

Far from being in the golden age of independent production and distribution of film and video product, we are now in a situation where independent producers face a constantly diminishing marketplace. As proud as we independents are of our creativity and ingenuity, we believe that today's independent film industry faces impenetrable barriers to a free marketplace – barriers which are not alleviated by current government policy. As a result of those barriers, independent producers and distributors, from the smallest to the largest, from the newest entrant to established industry giants such as Roger Corman, find it virtually impossible to sell programming to broadcast television or to cable/satellite channels in the U.S. today.

IFTA understands other elements of the production industry, including the Directors Guild of America, share these concerns, and will be submitting comments in this proceeding which also attest to this problem.

IV. THE CAUSE

The independent film industry's reverses began with the Commission's repeal of the Fin-Syn rules. ⁵ in 1993. Evaluation of the Syndication and Financial Interest Rules, 8 FCC Rcd 3282 (1993). The rules had prohibited network participation in two related arenas: the financial interest of the television programs they aired beyond first-run exhibition, and the creation of in-house syndication arms, especially in the domestic market. Consent decrees executed by the Justice Department in 1977 solidified the rules, and limited the amount of prime-time programming the networks could produce themselves. This system worked for networks, who profited from advertising revenues, for independent producers and distributors, who profited on the back end through syndication deals, and for audiences, who benefited from a fierce competition among creators to offer compelling programming to the networks.

In 1993 Fin-Syn was allowed to expire, in part because the networks insisted that their entry into the production business would increase the number of competitors in this field, a claim that proved to be inaccurate. What has happened is that the networks have consolidated and expanded their hegemony over a much larger territory. Today a network orders up a new program from its captive movie studio, broadcasts it on its on broadcast network in prime-time, then reruns it – repurposes it - a few days later on one

In its 1991 Report and Order ("R&O") in Docket No.90-162, the FCC repealed a portion of its Fid-Syn Rules but retained other portions of the rule. In Schurz Communications v. FCC, 982 F.2d 1043 (7th Cir. 1992). The Court vacated the 1991 R&O and remanded the matter to the Commission for further consideration. In its Second Report and Order ("Second R&O") in MM Docket No. 90-162, adopted in 1993, the Commission repealed significant portions of its fin-syn rules and scheduled the remaining rules for expiration. 8 FCC Rcd 3282, granted in part, Memorandum Opinion and Order ("MO&O") in MM Docket No. 90-162, 8 FCC Rcd 8270 (1993), aff'd sub nom. Capital Cities/ABC, Inc. v. FCC, 29 F3d 309 (7th Cir 1994). The Commission subsequently called the matter up for early consideration and eliminated the remaining aspects of fin-syn. Report and Order in MM Docket No. 95-39, 10 FCC Rcd 12165 (1995).

of its cable networks. Later its syndication arm may offer it for further reruns to broadcast stations.

The repeal of government constraints on vertical integration, and the retention of very limited horizontal constraints, have resulted in a new business model in which major motion picture studios are co-owned with national television networks; in which a single entity typically operates two broadcast television networks and many national cable/satellite networks; in which every significant player owns a captive production house, distribution and syndication arms, and the ultimate exhibition venues, whether theatre, cable MSO or direct broadcast satellite operator. In this new world of media behemoths, creativity and diversity of programming are sacrificed to the bottom line; fresh and engaging dramatic and comedic productions stand no chance of being purchased from outside producers when the buyer can produce internally another repackaged version of the same old low budget reality and game shows.

V. THE HARM

What does this mean for viewers? In the old regime, when producers vied to produce stimulating programming, viewers were treated to meaningful programs like "All in the Family," "Mash," and "The Cosby Show." However, conglomerates rarely produce prime-time programming that challenge their viewers. The current prime-time lineup demonstrates that the shrunken pool of captive producers are most likely to imitate each other's programming, however awful it may be.

The cost cutting that inevitably comes with consolidation has the networks focused on acquiring inexpensive programming such as the ubiquitous reality shows versus the more expensive (and substantive) hour-long dramas, mini-series and movies-

of-the-week. For example, NBC announced on October 19 that it would make a number of further cost cutting moves to enhance its already profitable bottom line, including dropping all scripted programming from the 8:00-9:00 Eastern prime time hour, to be replaced with reality and game show programming. NBC Taking Big Step Back From Television, The Washington Post, October 20, 2006, at A1.

Today the networks' prime-time schedules are focused on reality programming and other formula programming. The rest of the schedule is filled by internally produced programs. In network television, the amount of programming in prime time owned by the networks has grown from 15 percent in 1995 to over 75 percent today⁶. At the same time, independent programming has fallen from 50 percent to just 18 percent⁷. The networks do not have an economic incentive to compete in even a limited marketplace for independent programming; they have only an incentive to purchase their own programs. The loser is the viewer and the American public.

The harm to the television audience goes beyond the lowering of quality standards that comes when competition is eliminated. Dozens of production and syndication companies have been eliminated in the last ten years, destroying an infrastructure of independent production, a training ground for future producers, directors and writers of programming with an important perspective. Without the important new blood supplied by the independent production community, the future of prime time programming is bleak indeed.

⁷ Cooper, Exhibit IV-1, p. 39.

⁶ Cooper, Mark, "The Impact of the Vertically Integrated, Television-Movie Studio Oligopoly on Source Diversity and Independent Production," October, 2006, p. 31.

VI. THE SOLUTION

As we have shown, there is no longer a substantial independent sector in film or television programming. Distribution channels for independent films are disappearing, and there is very little independent programming in broadcast, prime time or syndication. The result is a decline in competition and a decline in diversity available to consumers. This proceeding offers the opportunity for the Commission to take steps to reverse that trend, and to serve the public interest by increasing the diversity of programming available to the American public.

While many independent producers are artists, they are also businessmen and realists. We realize that the Commission is unlikely to make dramatic structural changes to sever the studios from the networks, or to break up the media conglomerates that dominate the industry. Therefore, IFTA has proposed what it believes are modest steps that the Commission can adopt which would deliver positive benefits far outweighing the regulatory costs that would be incurred in their implementation and which would not unduly hamstring the networks, the studios, or other program distributors. These proposals focus on steps which are clearly within the Commission's authority in view of the role of networks as Commission licensees and the Commission's statutory authority to insure competition in the cable and satellite industries.

A. Network Prime Time. IFTA submits that a rational first step would be for the Commission to adopt rules that assure some opportunity for the public to benefit from the

⁸ Cooper, Exhibit IV-1, p. 39 and Exhibit IV-5, p. 43.

⁹ While stated somewhat differently than the proposals we understand will be submitted by the Directors Guild of America and other key members of the creative community, we believe our position is fully consistent with those proposals. We do offer certain enhancements to those proposals in the digital and cable areas. Except as to scope, our proposals are not intended to be materially in disagreement with the Guild position on any issue.

viewpoints of a diverse range of program producers and distributors. Therefore, we believe that the Commission should prohibit the four major television networks from filling more than 75% of their prime time schedules with programming produced by (a) the network, or any captive or affiliated entity, (b) entities controlled by or affiliated with, any other major national television network, or (c) entities controlled by or affiliated with, any of the top ten national cable MSOs or any national direct broadcast satellite operator. This would leave 25% of prime time programming available to be filled by literally hundreds of independent program producers and distributors, thus creating a vibrant and competitive market for prime time television programming.¹⁰

IFTA focuses on the network prime time schedule, rather than the overall program day, because prime time is the most important point of access for program suppliers. Prime time remains the most financially remunerative domestic revenue opportunity in television; it is the gateway to the lucrative syndication market; and it affects the prices that non-U.S. television channels will pay for product.

Without the incentives of fair access to the prime time schedule and the potential monetary rewards offered by the TV syndication market, independents have almost completely withdrawn from the development and production of prime time television series. With the relatively modest step proposed above, the Commission will have taken a great leap towards reestablishing the vitality of the independent production and distribution industry.

In referring to a "network," IFTA intends to include only those entities that meet the primary test for television network status – 15 hours of prime time programming a week to 25 affiliates in at least 10 states and broadcast in the English language. Using this test will insure that smaller incipient networks have greater freedom to rely on internal programming sources until they reach a recognized level of viability.

B. Digital Multicast. We also believe that the Commission should take steps to insure that the benefits of digital broadcasting are used to expand the opportunities for independent voices to obtain exposure to the American public. One major advantage of the digital transition is that broadcast stations will have the opportunity to "multicast" – to broadcast multiple streams of either high definition or standard definition programming – on either a full or part time basis. The Commission has recognized that with this new opportunity come certain obligations. For example, the FCC has applied children's programming obligations to digital multicasts, and has limited the extent to which such programming may be repetitious of programming shown on other multicast channels. See Children's Television Obligations of Digital Television Broadcasters, 39 CR 617 (Sept. 29, 2006).

IFTA believes that the Commission should use this proceeding as an opportunity to insure that digital multicast channels are open to entry by independent program producers. Therefore, we propose that the Commission adopt regulations relating to multiplex channels provided by one of the national television networks to its affiliates. We believe that such channels (other than the channel used to transmit the primary network feed) should be prohibited from carrying more than 75% of any entertainment programming that is sourced from (a) the network, or any captive or affiliated entity, (b) entities controlled by or affiliated with, any other major national television network, or (c) entities controlled by or affiliated with, any of the top ten national cable MSOs or any national direct broadcast satellite operator. By definition this would not affect news or sports channels that do not carry entertainment programming. Unlike the rule for primary network program channels, however, it would apply to all hours of the programming day.

Adoption of the proposed relief will permit the digital multicast channels to be used to encourage the development of diverse programming sources. This will also limit the ability of the networks to dominate the multicast programming of their affiliates, giving local stations the opportunity to better serve their own community. The proposal clearly is beneficial to the public interest.

C. Cable and Satellite Television. At this time, cable and satellite television do not provide a real outlet for independent programmers to sell product, and independent programming continues to decline as a percentage of their programming. This is due to the vertical integration in the cable and satellite business¹¹. The largest cable operators favor their programming over independently produced programming. Fox, one of only two DBS system operators is itself the owner of and integrated studio and television network business. No more than 29 cable/satellite channels are legitimate buyers of scripted, fiction programming. Almost all of these channels are owned or controlled by one of the four major networks or by a major cable television system owner – all vertically integrated media conglomerates.

Until about 2000, premium pay cable/satellite channels, such as Showtime and HBO were a significant market for independent productions. In 2000, there was a precipitous drop in the acquisition of independent programming by these organizations, and now independent programming rarely appears on Showtime, HBO, or the other premium cable/satellite channels. Generally, programming for these channels is done inhouse or by producers who have contracted with the pay channel to produce product under many of the same unfair terms and conditions as are imposed by the networks for prime time exhibition. Chief among these is that the conglomerate retains ownership

¹¹ Cooper, p.3.

rights. These practices have migrated to basic cable/satellite channels, where channels such as Lifetime, Sci Fi, and USA (all of which are owned by vertically integrated media conglomerates) may buy independent product, but do so while imposing onerous terms. Most prominent of these terms is the refusal to pay an independent producer a license fee that will cover production expenses, while taking exploitation rights in additional media and markets. This forces an independent producer to shoot a production in areas of the world with production incentives, to pre-sell foreign rights at a discount in order to generate funding large enough to cover the short fall, and to sacrifice revenue potential that might otherwise have been realized following the initial telecast.

We submit that the Commission should impose source limitations on the major cable operators similar to those we propose for network television. We believe that the Commission should adopt a rule providing that basic and pay cable and satellite channels be prohibited from carrying more than 75% of any entertainment programming that is sourced from (a) any entities operated, controlled by or affiliated with, any of the top ten national cable MSOs or any national direct broadcast satellite operator; or (b) any national television network, or any captive or affiliated entity of such a network.¹²

VII. CONCLUSION

As a result of the unfettered development of massive media conglomerates, there are clear barriers today that prevent a fair, level, robust and truly diverse marketplace for television and cable/satellite programming. Independent programmers have no leverage against the immense market power they face from the networks, and cable and satellite system operators. As a result, there is less diversity of programming choice for

¹² To the extent that this proceeding is not an appropriate venue for these suggestions regarding program source regulation in the cable and satellite industry, IFTA urges the Commission to immediately institute a new rulemaking to consider just such regulations.

consumers and a significant loss in terms of the quality of programming and flow of

ideas.

It is incumbent upon the Commission to protect the public interest in a vibrant and

diverse programming marketplace by adopting regulations that provide some balance to

the market. For the reasons set forth in these Comments, IFTA urges the Commission to

adopt limited and reasonable source limitations that will provide at least a modicum of

opportunity for independent programming voices to develop and flourish. The

suggestions set forth herein should therefore be adopted by the Commission.

Respectfully submitted,

INDEPENDENT FILM & TELEVISION

ALLIANCE

By: /s/ Jean M. Prewitt

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President and Chief Executive Officer

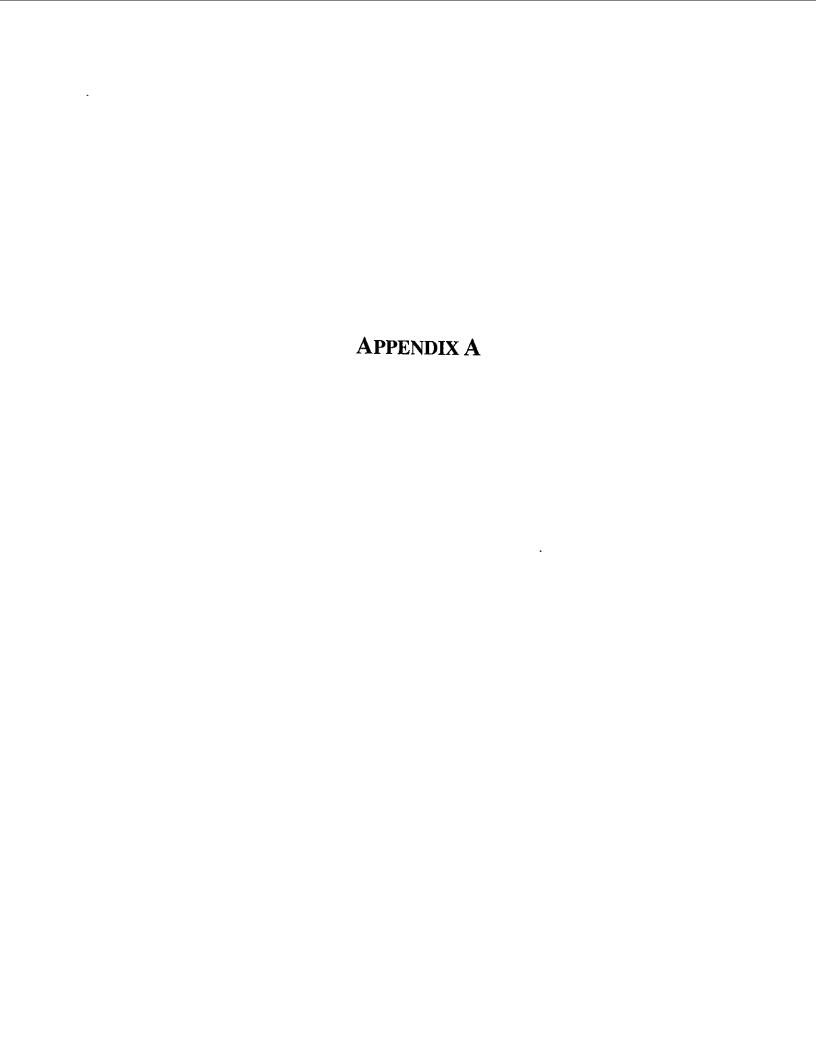
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THE IMPACT OF THE VERTICALLY INTEGRATED, TELEVISION-MOVIE STUDIO OLIGOPOLY ON SOURCE DIVERSITY AND INDEPENDENT PRODUCTION

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I. INTRODUCTION & OVERVIEW

THE EMERGENCE OF A VERTICALLY INTEGRATED OLIGOPOLY IN TELEVISION

This paper examines the impact of three major policy changes in the early and mid1990s on the production and distribution of video content, primarily broadcast television
programming in America: the repeal of the Financial Interest / Syndication rules and the
enactment of both the Cable Act of 1992 and the Telecommunications Act of 1996. The
paper also considers how the production and distribution of movie programming for cable and
theatrical release were affected. It shows that these policy changes led to the formation of a
vertically integrated oligopoly in television entertainment and a dramatic shrinkage of the role
of independent producers of content. The policy changes and resulting alterations in market
structure and behavior were not limited to the broadcast sector, however. They also affected
the syndication market, cable television and theatrical movies because prime time
programming plays a critical role in the overall video entertainment product space. If not
amended, these same policy changes could have a major impact upon the ability of
independents to offer product through the Internet and other developing digital platforms,
including the rapidly approaching digital multi-cast channels.

Over the course of a decade, the content aired on prime time network television, TV syndication, basic and pay cable channels, and theatrical movies came to be dominated by a handful of vertically integrated entities.² Dozens of independent entities that produced video

¹ See Chapter III for a discussion of these policy changes and their impact on industry structure.

² See Chapter IV for a detailed description of the changes in program sources that followed the policy and structural changes in the industry.

content were replaced by a handful of firms that own major movie studios and television production units, hold multiple broadcast licenses and own the dominant cable networks. The role of independent producers has been squeezed across all distribution platforms.

By two widely accepted economic measures of market concentration, the Herfindahl-Hirschman Index (HHI) and the market share of the top four firms (the 4 Firm Concentration Ration or CR-4), the video market has become a concentrated, vertically integrated, tight oligopoly. As a result, this oligopoly engages in a number of predatory business practices that both limit competition from independents and deprive the public of new, fresh voices. They foreclose the market to independents by leveraging their vertical market power and by self-supplying product. They exercise their market power as buyers of content (monopsony power) with two practices that are especially damaging to competition from independent producers. The first is that networks often demand that they be given an equity participation in an independently developed television series in order for it to be placed on the primetime schedule. The second is that basic cable channels owned by members of the oligopoly will not pay license fees that are commensurate with the production values and the scope of licensed rights they demand in independently produced TV movies.

EFFECT OF THE VERTICALLY INTEGRATED OLIGOPOLY ON THE TELEVISION MARKET

Fifteen years ago, theatrical movie studios and broadcast television were almost entirely separate while cable television was just developing as a primary outlet. In each of these markets, there was a substantial independent sector. Major studios provided about one third of product shown on network prime time television while the networks themselves accounted for just 15%. Non-major studios, known as "independents," supplied nearly one

half. One set of independents sold movies to broadcasters. Another set sold series and other programming. A few produced and sold both. Vertical integration has changed that situation.

The vertically integrated major studios and broadcasters now account for over 75% of broadcast prime time television programming while independents account for less than 20%. The few independents that get on prime time television produce reality shows, not scripted programming. As a result, independents have been virtually shut out of the lucrative syndication market, now accounting for just 18% of all first run syndication programming hours and none of the programming hours for shows that have gone into syndication over the last two years.

The economic terrain of cable television has also changed for independents. The vertically integrated media companies own 24 of the top 25 cable channels. The independents' share of pay cable programming also continues to decline as a percentage of programming, dropping by some 15% since the late nineties. Independent product was also squeezed out of syndication. Independent product is increasingly consigned to the far less visible and less financially rewarding basic cable channels where license fees are much lower and in many cases inadequate to cover production costs. Additionally, product placed on basic cable does not have the same potential to realize foreign sales that pay cable product enjoys.

The business practices used to accomplish this dramatic shift in the flow of content in the video product space exhibit characteristics that clearly fit the pattern of abuse of market.³ By controlling distribution and vertically integrating into production, five of the dominant broadcasters have become gatekeepers who favor their affiliated content, restrict access of

³ See Chapter V for a discussion of these business practices and their effect on source diversity and independent production of video content.

independents to the market, and impose onerous terms and conditions on independent producers that have further shrunk the sector.

While it is extremely difficult to assess the impact of the changes in the industry on quality, there is no doubt that the independent sector was a consistent source of innovative and high quality content in both the TV series and movies categories prior to the changes in policy. Measured by both popularity and awards, the independents more than hold their own when given a chance to reach the public. This quantitative evidence reinforces the celebrated anecdotal evidence – shows like *All in the Family* and *Cosby* – frequently offered about the importance of independent production. It is quite clear that the elimination of independents from the high value TV product spaces – prime time and premium cable – cannot be attributed to poor quality of product. It is more readily attributed to changes in the structure of the industry and the business practices of the dominant, vertically integrated oligopoly.

The key elements of the video entertainment product space fit a pattern that the literature on industrial organization describes as the exercise and abuse of market power.

These elements include:

Market Structure and Market Power

- Market shares that have risen to the level traditionally defined as a source of concern about concentration setting the stage for the abuse of market power.
- Substantial barriers to entry in the industry.
- A history of anticompetitive practices.

Vertical Integration

• Barriers to entry increased by vertical integration.

⁴ See Chapter VI for a discussion of quality.

- The foreclosure of markets to unaffiliated producers through favoritism of affiliated upstream production and the subsequent exit of upstream product suppliers from the market.
- Parallelism and reciprocity among the dominant firms in the oligopoly.
- A rush to integrate and concentrate across the sector.

Monopsony (buyer) Power over independent producers.

- The imposition of prices that squeeze unaffiliated producers and terms that shift risk onto those producers.
- Indications of a decline of quality in product attendant on the abuse of monopsony power.
- Flooding of downstream outlets with integrated product.

POLICY IMPLICATIONS OF CONSOLIDATION AND INTEGRATION

The swift and massive horizontal consolidation and vertical integration in the industry raises a number of concerns. The analysis of the economic impact of horizontal concentration and vertical integration can be found across many areas of economic activity, but the unique nature and role of video entertainment raises additional, perhaps even greater concerns in non-economic areas. Television and movies, the former in particular, are fundamental to democratic discourse. Television is the dominant medium in terms of time spent on entertainment and news and information gathering.⁵ It is overwhelmingly the choice for national campaign advertising. Entertainment on television can be cultural, educational or political. Theatrical releases have a prominent role in the public discourse as well, which films such as *Crash* and *The Passion of the Christ* have demonstrated in recent years.

⁵ Cooper Mark, *Media Ownership and Democracy in the Digital Information Age* (Palo Alto: Stanford Law School Center for Internet and Society, 2003).

Television and movies play an important part in the marketplace of ideas. A nation that prides itself on freedom of speech and diversity while simultaneously issuing exclusive licenses to private firms to broadcast content faces a dilemma. The issuance of a handful of broadcast licenses in each market in America creates a privileged class of speakers through government action. Local governments issue franchises to cable TV operators, which are even more scarce than broadcast licenses on a city-by-city, county-by-county basis.

How one promotes diversity with such a small number of electronic voices, without dictating what content broadcasters should air, becomes a major source of concern. If those very valuable and powerful government-granted platforms for reaching the public become the core of a tight oligopoly that dominates other areas of expression, the concern is compounded.

If dictating content is ruled out by First Amendment free speech concerns, but policy makers continue to strive for diversity, then the primary option is to build media market structures that disperse the opportunity to speak as much as possible within the confines of the granting of licenses and franchises. The principle on which this approach stands is simple. By ensuring a wider opportunity to put content before the public, diversity and discourse are stimulated without dictating the substance of the content supplied.

POLICIES TO PROMOTE DIVERSITY

For much of the twentieth century, the Congress and the Federal Communications

Commission pursued this goal of diversity by simultaneously dispersing ownership of

production and distribution of content. The number of media outlets that could be owned by a

single entity was restricted both within a market (the local television multiple ownership

rule.⁶ and across the nation (a national cap) by the national television multiple ownership rule.⁷ The amount of content aired in prime time that any given network could own was limited as well by the Financial Interest and Syndication Rules (Fin-Syn) and the Prime Time Access Rules.⁸ Similarly, consent decrees in cases brought by the Department of Justice mirrored the Fin-Syn rules.⁹ Other FCC rules prevented Broadcast license holders from owning other types of media outlets – e.g. newspapers and cable TV systems (crossownership limits)¹⁰ -- and restricted their ability to engage in cross-media ownership (e.g. radio).¹¹ The result was a substantial dispersion of ownership of content.

In the 1990s, the two primary policies to promote diversity of ownership of content in broadcasting were eliminated or cut back. The Financial Interest and Syndication Rules (Fin-Syn) that governed prime time programming were allowed to expire and the consent decree was also vacated – allowing broadcasters to own as much programming as they wanted. The

⁶ 47 C.F. R. 73.355(b), the duopoly rule, lifted the ban on multiple station ownership, but 47 C.F.R. 73.658(g), the dual network rule, restricted the combinations of television stations, to disallow dual or multiple network ownership that involves a combination between ABC, CBS, Fox, or NBC. Citations to the rules are currently being reviewed, which generally relaxed the restrictions on cross ownership in the 1990s and are the latest in the evolving regulatory structure.

⁷ 47 C.F. R. s 73.3555(e)

⁸ The two rules have always been closely linked see Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting, 23, FCC 2d 282 (1970). Amendment of Part 73 of the Commission's Syndication and Financial Interest Rule, 47 FR 32959 (1982), as they were in the court case that led to their ultimate expiration, see Shurz Communication Inc. v. FCC 982 F. 2d 1043, 1049 (7th Cir. 1992).

⁹ Identical consent decrees were entered against the three major networks, which followed the Fin-Syn rules closely. These were vacated when in the early 1990s, as the Fin-Syn rules were allowed to expire...

¹⁰ 47 C.F. R. s 73.3555(d), cross-ownership of broadcast states and newspapers, prohibits the common ownership of a daily newspaper and a broadcast station in the same market.

¹¹ 47 C.F.R. 73.3555(c), the radio-television cross –ownership rule, limits the number of TV and radio licenses that can be held within a market.

limits on multiple station ownership were relaxed – allowing them to own two stations in the nation's largest and most important markets. A third policy also gave broadcasters the right to carriage on cable systems (must-carry/retransmission). The terrain of the American media landscape was dramatically altered by these policy changes as the broadcasters moved quickly to use these three new sources of leverage in the video market.

Whether or not Congress anticipated the powerful effect that the policy changes of the 1990s would have on diversity of ownership of programming is unclear. Although the FCC has created records on these issues in its proceedings subsequent to the changes in policy, the courts have remanded several of its rules, ¹³ leaving their regulatory status in flux and Congress has included a provision that requires frequent review of the rules. ¹⁴

The FCC continues to have the authority to implement restrictions on media ownership to accomplish the goals that Congress has set in legislating media policy, ¹⁵ with the exception of the national multiple ownership rule. To the extent that Congress continues to embrace the goal of diversity, the current situation and how the policy changes of the 1990s created it are what matters now. Moreover, since Congress ordered the FCC in the Telecommunications Act of 1996 to periodically review its rules, the FCC could conclude that

¹² Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

¹³ Indeed, all of the major structural rules written in the late 1990s have been remanded by the court (broadcast multiple station limits, cable horizontal limits, newspaper cross ownership) or overridden by Congress (national cap).

¹⁴ The 1996 Act provided for a biennial review (*Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996). This was later extended to four years (*FY2004 Consolidated Appropriations Act* (Public Law 108-109, 118 Stat. 3 et seq. Section 629) and prohibited the FCC from further reviewing the national cap.

As with the other rules overturned by the courts, in the case of the Fin-Syn rules, while the courts rejected the specific FCC rule (*Schurz Communications Inc. v. FCC* 982 F. 2^d 1043 (7th Cir. 1992), it did not preclude the writing of an alternative rule. To date, the FCC has elected not to do so.

the rule changes it has implemented with agency discretion have harmed diversity, a goal that Congress continues to embrace. The FCC could re-institute those policies that successfully promoted source diversity in the past or it could seek new policies that will promote source diversity in the future.

This paper shows that the current policies are not promoting independent production of video content on the major television platforms. Understanding the impact of past rule changes is the first step in the process of re-examining the decline of sources diversity on television. That is the subject of this paper. While the purpose of this paper is not to recommend specific policy changes, it is clear that if policymakers still believe in source diversity, then a change in policy that directly alters the structure and conduct of the vertically integrated oligopoly are is necessary.

OUTLINE

The paper is based on four sources of data:

- Over a dozen interviews with executives involved in the production of content for television, theatrical and video release.
- A review of the academic literature
- A review of the trade and popular press
- A database that charts market shares in every major domestic and foreign platform for exhibition and release of audiovisual product.

Chapter II outlines the basic issues and analytic approaches. It first describes the product space I am studying and then the analytic approach that I take.

Chapter III describes the policy changes and subsequent changes in market structure and conduct of the vertically integrated video entertainment product space. First it examines

the impact of the repeal of the Fin-Syn rules on the market structure of the video entertainment product spaces. Then it surveys the current state of the video entertainment product space.

Chapter IV examines the change in the sources of content that resulted from the change in market structure. It begins with an analysis of prime time and broadcast programming. Then it turns to the patterns of distribution of TV movies, which includes a great deal of cable content. Finally it assesses the importance of prime time broadcasting to the overall video entertainment product sector.

Chapter V discusses the impact of the market structure on the production and distribution of content. The focus is on the gate-keeping role of the vertically integrated movie/broadcast/cable companies.

Chapter VI reviews that debate over the impact of the vertically integrated oligopoly on the quality of programming.

Chapter VII offers some concluding observations on the role of the Internet.

II. DEFINING THE PRODUCT SPACE AND ANALYTIC APPROACH

THE OBJECT OF STUDY

This is a study of the industrial organization of the video entertainment sector – theatrical movies, all forms of television and the sale and rental of tapes and DVDs – in the United States. Because the sector is complex, I adopt the following definitions. The sector consists of six primary channels for the distribution of content:

- theatrical movie releases,
- prime time airing of movies and series on broadcast television,
- **syndication** on broadcast television in non-prime time slots of both movies and series,
- movies and series aired on pay cable,
- movies and series aired on basic cable networks.
- **Home Video** i.e. sale/rental of video for viewing on VCR and DVD players.

I refer to the overall sector made up of the six distribution channels as the video entertainment product space. The Internet has just begun to be used as a means of redistributing video product that was originally released through one of the other six outlets. While there are clear indications that it will change the current terrain of the video entertainment product space in the long run, there are also clear indications that it will not deconcentrate the sector. Already, the networks are multicasting current primetime programming through their websites and Internet protocol television (IPTV) channels are coming on line. Internet video on demand services (VOD), such as Cinema Now and Movielink, are gaining visibility and subscribers as broadband service penetrates deeper into